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Supreme Court, U.S.
FILED

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No. 02-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ERNESTO TIJERINA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER T. STIDVENT
Counsel of Record
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
(202)639-7763

Attorney for Petitioner

3DPS

QUESTION PRESENTED

1. Whether the Government breached its plea agreement with the petitioner by refusing to recommend that he receive a downward departure for his substantial assistance to the Government.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

JURISDICTION 2

STATEMENT OF THE CASE 2

A. Background and Prior Proceedings 2

REASONS FOR GRANTING THE PETITION 6

I. THE FIFTH CIRCUIT'S ERRONEOUS CONCLUSION THAT IT WAS WITHOUT DISCRETION TO GRANT A MOTION FOR DOWNWARD DEPARTURE MISTAKENLY ABSOLVES THE GOVERNMENT OF THE DUTIES IT ASSUMED PURSUANT TO ITS PLEA AGREEMENT WITH MR. TIJERINA AND UNDERCUTS *SANTOBELLO* 9

II. THE ISSUES PRESENTED ARE IMPORTANT AND RECURRING 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES:

Berger v. United States,
295 U.S. 78 (1935) 15

Mabry v. Johnson,
467 U.S. 504 (1984) 13

Margalli-Olvera v. INS,
43 F.3d 345 (8th Cir. 1994) 7

Santobello v. New York,
404 U.S. 257 (1971) 6, 10, 13

United States v. Coleman,
895 F.2d 501 (8th Cir. 1990) 13

United States v. Garcia-Bonilla,
11 F.3d 45 (5th Cir. 1993) 9

United States v. Hernandez,
17 F.3d 78 (5th Cir.1994) 11

United States v. Isaac,
141 F.3d 477 (3rd Cir. 1998) 14-15

United States v. Laday,
56 F.3d 24 (5th Cir. 1995) 10

United States v. Lukse,
286 F.3d 906 (6th Cir. 2002) 8, 10

United States v. McQueen,
108 F.3d 64 (4th Cir. 1997) 15

United States v. Melton,
930 F.2d 1096 (5th Cir. 1991) 11, 13

United States v. Price,
95 F.3d 364 (5th Cir. 1996) 5, 9

United States v. Rounsavall,
128 F.3d 665 (8th Cir. 1997) 13

United States v. Solis,
169 F.3d 224 (5th Cir. 1999) 9

United States v. Sutton,
794 F.2d 1415 (9th Cir. 1986) 7

United States v. Velez Carrero,
77 F.3d 11 (1st Cir. 1996) 6

United States v. Watson,
988 F.2d 544 (5th Cir. 1993) 10, 13

United States v. Wilder,
15 F.3d 1292 (5th Cir. 1994) 11

Wade v. United States,
504 U.S. 181 (1992) 13

STATUTES AND REGULATIONS:

Federal Criminal Code and Rules 52 (West 1999) 6

Fed. R. Crim. P. 11(e) 6

21 U.S.C. § 841(a)(1) and (b)(1)(A) 2

18 U.S.C. 3553(e) 2

28 U.S.C. § 1254(1) 2

U.S. Sentencing Guidelines
Section 5K1.1 2

OTHER AUTHORITIES:

Justin H. Dion, *Criminal Law – Prosecutorial Discretion or Contract Theory Restrictions? The Implications of Allowing Judicial Review or Prosecutorial Discretion Founded on Underlying Contract Principles*, 22 W. New Eng. L. Rev. 149, 151 (2000).....14

Ross Galin, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 Fordham L. Rev. 1245, 1254 (2000).....7

Cynthia Lee & Brian Derdowski, Jr., *The Future of Substantial Assistance: Recommendations for Reform*, 11 Fed. Sent. Rptr. 2 (Sept.-Oct. 1998).....7

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---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ernesto Tijerina respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Background and Prior Proceedings

On July 28, 2000, a one count indictment was filed against Ernesto Tijerina in the Corpus Christi Division of the Southern District of Texas. *See* Court of Appeals Record ("C.A. Record") at 0059. The indictment charged that on or about July 16, 2000, Mr. Tijerina did knowingly and intentionally possess with intent to distribute approximately 1,131 kilograms (gross weight) of marijuana in violation of Title 21 U.S.C. § 841(a)(1) and (b)(1)(A). *See id.*

On August 28, 2000, Mr. Tijerina plead guilty to the indictment. *See* C.A. Record at 0055. His plea was made pursuant to a Rule 11(e)(1)(B) written agreement in which the government agreed to recommend that Mr. Tijerina receive credit for acceptance of responsibility and that he be sentenced at the lowest end of the applicable guideline range. *See* C.A. Record at 0050-51; App. 3a – 6a. More specifically, the relevant language of Mr. Tijerina's plea agreement read as follows:

> Furthermore, should the Defendant provide substantial assistance to the Government as outlined in U.S. Sentencing Guidelines, Section 5K1.1 and 18 U.S.C. 3553(e)[,] the Government will recommend to the Court a reduction in the Defendant's sentence and recommend a sentence commensurate with the value, completeness, and truthfulness of the Defendant's information. This agreement does not obligate the Government Attorney to

> make a motion for downward departure if in the Government Attorney's evaluation the Defendant had not provided substantial assistance. Substantial assistance is understood by both parties to require good faith during all phases of the cooperation period, to include complete and honest debriefing which assists in the investigation or prosecution of other individuals, and complete and truthful testimony at subsequent trials when needed. In this connection, it is understood the Government's determination of whether the Defendant has cooperated fully and provided substantial cooperation, and the Government's assessment of the value, truthfulness and completeness of the Defendant's cooperation are solely within the judgment and discretion of the Government and shall be binding upon the Defendant. The Defendant agrees the decision whether to file such a motion rests within the sole discretion of the Government.

C.A. Record at 0052; App. 4a-5a.

On October 12, 2000, Mr. Tijerina sent a letter to the District Court in which he reiterated earlier offers he had made to assist the Government with its ongoing investigation into several of his alleged co-conspirators who remained at large. *See* C.A. Record at 0045. He enclosed a copy of the letter he had written to his attorney, Oscar Vega, on October 5, 2000, in which he offered to answer any questions concerning the investigation and to be as cooperative as possible. C.A. Record at 0046. In this letter of October 12, Mr. Tijerina noted that he had provided names, addresses and phone numbers of his alleged co-conspirators to the investigators, the district attorney, and his own attorney. *See id.*

After some further proceedings, Mr. Tijerina plead guilty to Count One of the indictment. *See* C.A. Volume 4,

Supplemental Record on Appeal, at 22-23. At sentencing, the Court granted Mr. Tijerina's trial counsel's motion for downward departure for Mr. Tijerina's acceptance of responsibility and sentenced Mr. Tijerina to 120 months in prison. See C.A. Volume 5, Supplemental Record on Appeal, at 5. As the Court had noted elsewhere with regard to Mr. Tijerina's request for acceptance of responsibility:

> THE COURT: He's always admitted that he received the drugs, that he did that voluntarily, and that he was engaged in the commission of a drug trafficking crime then.
>
> [THE GOVERNMENT]: I agree with the Court's position that it doesn't have anything to –
>
> THE COURT: It's not a position. Isn't that the fact?
>
> [THE GOVERNMENT]: That's the fact.

See C.A. Volume 3, Supplemental Record on Appeal, at 27. The Government did not, however, file at any time a motion for downward departure based upon any substantial assistance Mr. Tijerina may have provided to the Government in his efforts to assist the federal authorities as they pursued other individuals allegedly involved in the drug trade.

Mr. Tijerina filed his *pro se* notice of appeal on November 20, 2000. There, in an addendum to his *pro se* notice of appeal, he again emphasized his willingness to help the Government bring his alleged co-conspirators to justice. *See* C.A. Record at 0013 (reverse side). Consistent with his earlier full disclosures to the Government regarding the details of his crime, Mr. Tijerina offered to assist the Government in its prosecution of two individuals (Freddy Richie and Jesse Ruiz) whom he alleged were involved in the

commission of his own crime. *See id.* Continuing his history of providing all the potentially useful information to the Government that he possible could, Mr. Tijerina again went over the details of his alleged co-conspirators' involvement in this crime in his notice of appeal. *See id.*

Counsel subsequently was appointed to Mr. Tijerina pursuant to the Criminal Justice Act of 1964, and his appeal was briefed to the Fifth Circuit. In his appeal, Mr. Tijerina argued in part that the Government had breached its plea agreement with him by failing to make a motion for downward departure pursuant to the terms of the plea agreement. Mr. Tijerina noted in making this argument that "the Government may bargain away its discretion under the terms of a plea agreement, and thereby obligate itself to move for downward departure in exchange for the defendant's substantial assistance." He argued that had happened in the present case, and that the Government therefore was obligated to file a motion for downward departure in his case in recognition of the assistance he had provided and remained willing to provide.

On April 15, 2002, however, the Fifth Circuit issued its order affirming Mr. Tijerina's sentence. In its order, the Fifth Circuit noted only the following when addressing Mr. Tijerina's argument that the Government had breached its plea agreement with him (App. 2a).:

> Tijerina complains that he did not receive a downward departure under U.S.S.G. § 5K1.1. The district court is without the authority to grant a downward departure without a Government motion. *See United States v. Price*, 95 F.3d 364, 367 (5th Cir. 1996).

The Fifth Circuit did not address at all Mr. Tijerina's contentions that the Government had breached its plea agreement with him by refusing to file a motion for

downward departure. Nor did it discuss the relevant Fifth Circuit case law holding that the Government may bargain away its discretion to make a motion for downward departure because of a defendant's substantial assistance to the Government.

REASONS FOR GRANTING THE PETITION

"The disposition of criminal charges by agreement between the prosecutor and the accused . . . is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). A prosecutor's agreement that, in any significant degree, induces a defendant to enter a plea, creates a duty to satisfy obligations that have arisen under that agreement. *See id.* at 262. Thus, in *Santobello* this Court treated the plea agreement as any other contract, and held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id; see also United States v. Velez Carrero,* 77 F.3d 11, 11 (1st Cir. 1996) ("Because plea bargaining requires defendants to waive fundamental constitutional rights, we hold prosecutors engaging in plea bargaining to 'the most meticulous standards of both promise and performance.'" (quotation omitted)) Subsequent to this Court's *Santobello* decision, Fed. R. Crim. P. 11(e) was amended "to give recognition to the propriety of plea discussions; to bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement." Federal Criminal Code and Rules 52 (West 1999).

Following *Santobello*, Courts of Appeals have come to regard plea agreements as contracts, and they apply contract law principles – like breach, consideration, and the duties of performance and good-faith – in their review of plea agreements. Typical of this approach is the Eighth Circuit's

statement in *Margalli-Olvera v. INS*, 43 F.3d 345, 351 (8th Cir. 1994) that "[p]lea agreements are contractual in nature, and are interpreted according to general contract principles." *See also United States v. Fitch*, 282 F.3d 364, 366 (6th Cir. 2002) (citing *Santobello* and noting that "[p]lea agreements are contractual in nature" (quotation omitted)); *United States v. Ballis*, 28 F.3d 1399, 1409 (5th Cir. 1994) ("Plea bargain agreements are contractual in nature, and are to be construed accordingly."); *United States v. Sutton*, 794 F.2d 1415, 1423 (9th Cir. 1986) (holding that plea bargains are "contractual in nature and must be measured by contract law standards").

Santobello and its progeny hold that plea agreements are properly treated as contracts. The evidence indicates, however, that these agreements frequently are treated as contracts that bind only the defendant. For example, one recent study concluded that only 38.6% of those defendants who cooperate with prosecutors, either through formal agreements or informally, receive the benefit of a substantial assistance departure motion from prosecutors. *See* Cynthia Lee & Brian Derdowski, Jr., *The Future of Substantial Assistance: Recommendations for Reform*, 11 Fed. Sent. Rptr. 2 (Sept.-Oct. 1998). For the many defendants who provide assistance but do not receive the benefit of these downward departure motions, simply demonstrating that they provided substantial assistance is not enough to force prosecutors to fulfill substantial assistance agreements like the plea bargain made in Mr. Tijerina's case. As another commentator has noted, "the courts are littered with cases in which prosecutors have refused to honor the agreements they formed with defendants." Ross Galin, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 Fordham L. Rev. 1245, 1254 (2000).

Statistics like the one above indicate that the language of plea agreements like the one at issue here frequently promise

something and deliver nothing to defendants like Mr. Tijerina. While the Government agreed to move for a downward departure if Mr. Tijerina provided substantial assistance to it; it also noted that the decision whether or not to so move remained in its "sole discretion." The Fifth Circuit apparently understood this to mean that the Government had promised Mr. Tijerina nothing, and the Court did not undertake even the most rudimentary analysis of the language in Mr. Tijerina's plea agreement. But the Government did promise Mr. Tijerina something: it promised to file a motion for downward departure if it determined that he had provided it with substantial assistance. *See, e.g., United States v. Lukse*, 286 F.3d 906, 910 (6th Cir. 2002) ("[O]ur inability to review the Government's decision to file a substantial assistance motion for bad faith does not allow the government to openly breach plea agreements."). Mr. Tijerina would contend that he has substantially assisted the Government to the best of his ability, and that this assistance should be rewarded pursuant to the plain language of his agreement with the Government.

Presumably, prosecutors make promises like the one here in plea agreements like this every day. By taking such a liberal view of what constitutes performance and good faith, courts like the Fifth Circuit here have effectively weakened the *Santobello* principles that promises that induce pleas must be fulfilled. Moreover, this liberal approach has created a legal standard that allows prosecutors to easily escape their duty to perform. Given the importance of plea agreements to the disposition of criminal cases and the relatively low percentage of defendants who benefit from motions for downward departure after they have provided the Government with substantial assistance, Mr. Tijerina would respectfully submit that this Court should grant his petition and determine just what the Government may agree to in a plea agreement like Mr. Tijerina's without at the same time

bargaining away its discretion to file a motion for downward departure.

I. THE FIFTH CIRCUIT'S ERRONEOUS CONCLUSION THAT IT WAS WITHOUT DISCRETION TO GRANT A MOTION FOR DOWNWARD DEPARTURE MISTAKENLY ABSOLVES THE GOVERNMENT OF THE DUTIES IT ASSUMED PURSUANT TO ITS PLEA AGREEMENT WITH MR. TIJERINA AND UNDERCUTS *SANTOBELLO*.

The Fifth Circuit did not interpret Mr. Tijerina's plea agreement properly. It is true that "[a]bsent a motion for downward departure made by the Government, a sentencing court is without authority to grant a downward departure on the basis of substantial assistance under § 5K1.1." *United States v. Price*, 95 F.3d 364, 367 (5th Cir. 1996). Admittedly, "[section] 5K1.1 does not require the [G]overnment to move for a downward departure if the defendant provides substantial assistance, but rather grants the [G]overnment discretionary power to make such a motion." *United States v. Garcia-Bonilla*, 11 F.3d 45, 46 (5th Cir. 1993). There are, however, two limitations on the Government's discretion. First, a district court may review the Government's refusal to move for a downward departure if the refusal is based on an unconstitutional motive. *See United States v. Solis*, 169 F.3d 224, 226 (5th Cir. 1999); *Price*, 95 F.3d at 368. Second, "the [G]overnment may bargain away its discretion under the terms of a plea agreement, and thereby obligate itself to move for downward departure in exchange for the defendant's substantial assistance." *Price*, 95 F.3d at 368.

Mr. Tijerina respectfully contends here, as he did before the Court of Appeals, that the Government bargained away its discretion in his case. One the one hand, Mr. Tijerina's

Plea Agreement admittedly stated that the Government retained "sole discretion" to determine whether or not to make a motion for downward departure pursuant to Section 5K1.1. C.A. Record at 0052. On the other hand, however, his Agreement also stated that "should the Defendant provide substantial assistance to the Government . . . the Government *will recommend* to the Court a reduction in the Defendant's sentence and recommend a sentence commensurate with the value, completeness, and truthfulness of the Defendant's information." *Id.* at 0051 (emphasis added). The language, at the very least, is contradictory; and since it is contradictory, the plea agreement should be construed in Mr. Tijerina's favor. Moreover, *Santobello* dictates that when a plea agreement rests on the promise of a prosecutor, that promise must be fulfilled. 404 U.S. at 262.

Court of Appeals precedent has recognized that the question of whether or not the Government has retained its discretion to refuse to move for a downward departure for substantial assistance turns upon the specific language of the plea agreement at issue. In those cases in which the Government indicates in the plea agreement that it "will file" a motion, or other language to that effect, in exchange for the defendant's substantial assistance, several circuits have held that the Government has surrendered its discretion. *See, e.g., Lukse,* 286 F.3d at 912-13 (analyzing plea agreement with "will file" language and holding that "although the government had complete discretion to determine if the Appellants had rendered substantial assistance, the [plea] agreement still imposed certain restraints on them. . . . [I]f they determined that substantial assistance had been rendered in either the prosecution or investigation of other suspects, they were required to file the [substantial assistance] motions."); *United States v. Watson*, 988 F.2d 544, 552 (5th Cir. 1993) ("will file"); *United States v. Laday*, 56 F.3d 24, 26 & n. 1 (5th Cir. 1995) (plea agreement providing government "will file" motion if defendant provides

substantial assistance obligated government to give defendant opportunity to do so); *United States v. Melton*, 930 F.2d 1096, 1097-98 (5th Cir. 1991) (concluding that if district court determined on remand that defendant relied on transmittal letter from assistant United States Attorney stating "I will recommend" departure and offered substantial assistance or stood ready to do so, Government obligated to move for downward departure).

The Plea Agreement here stated that the Government "will recommend" a downward departure in exchange for Mr. Tijerina's substantial assistance. This language suggests that the Government bargained away its discretion. *See United States v. Wilder*, 15 F.3d 1292, 1296-97 (5th Cir. 1994) (holding that a sentencing court's determinations that the defendant did not provide substantial assistance and was not entitled to downward departure could not be made without finding what parties believed would constitute substantial assistance when the plea agreement was entered and without addressing the defendant's claim that the government investigators failed to follow up on information provided by him); *United States v. Hernandez*, 17 F.3d 78, 81-83 (5th Cir.1994) (vacating sentence and remanding case because "[t]he record sheds no light on the degree of discretion, if any, the parties intended for the government to retain by the use of the permissive word 'may' (as opposed to the mandatory 'will' or 'shall'").

Moreover, in connection with this "substantial assistance" determination (which neither the Government nor the Fifth Circuit ever reached), Mr. Tijerina would point out that he has been truthful and cooperative with the Government at every stage of its investigation, and that he is continuing to work with an agent of the Federal Bureau of Investigation in an attempt to bring his alleged co-conspirators to justice. Mr. Tijerina has communicated with this Agent on several occasions, and he has provided that Agent with detailed

information that he believes will prove helpful to the FBI as it investigates other individuals allegedly involved with the transport of illegal drugs.

To date, Mr. Tijerina stands alone among the individuals allegedly involved in this crime as the only one to be punished. The Court stated Mr. Tijerina's position succinctly when it noted:

> THE COURT: And that's what Mr. Tijerina is saying I should do. "I have told the United States all they need to know about prosecuting other persons. Now, having told them that, they have a duty to proceed on what I've told them." That's his position. Am I stating it correctly, Mr. Tijerina?
>
> THE DEFENDANT: Yes sir.
>
> Volume 3, Supplemental Record on Appeal, at 24.

While Mr. Tijerina was the only individual punished for this crime, he has steadfastly maintained that he was not the only one involved in it. Mr. Tijerina's story consistently has been that his brother-in-law, at the very least, was involved with transporting this load of marijuana across the border. *See, e.g.*, Volume 3, Supplemental Record on Appeal, at 30 ("He was going to set up the load, have his brother-in-law drive the load."); 18 ("My brother-in-law was the one that said that he was going to traffic it."); 19 ("Is there a way that I can get a fair trial for my brother-in-law and subpoena the ones that are involved with me?"). Mr. Tijerina's subsequent supplementation to his disclosures has been just that – supplementation. At no time has Mr. Tijerina's later version of what occurred conflicted with his earlier story. Instead, at later dates, Mr. Tijerina has given the Government further details to help bolster his earlier truthful rendition of what had occurred, and to assist the Government in its ongoing

investigation of Mr. Tijerina's alleged co-conspirators. *See id.* at 32. Mr. Tijerina's continued meetings with and assistance to the FBI as it conducts its investigation is indicative of the extent of his substantial assistance.

Here, the Government agreed to make a departure motion under section 5K1.1 or 3553(e), or both, if in its sole discretion it determined that Mr. Tijerina provided substantial assistance. Therefore, the executed agreement supersedes the government's otherwise broad discretion. *See, e.g., United States v. Rounsavall*, 128 F.3d 665, 668 (8th Cir. 1997); *United States v. Watson*, 988 F.2d 544, 552 (5th Cir. 1993) (stating that "[t]he crucial element . . ., which was not present in *Wade*, is the existence of a plea bargain in which the government bargained away its discretion to not submit a [departure] motion"); *cf. Wade v. United States*, 504 U.S. 181, 185 (1992) (indicating that the defendant had not claimed that an agreement by the government to file a departure motion had superseded the condition that one be filed). Consequently, the District Court and the Fifth Circuit should have looked to the plea agreement, and not the sentencing guidelines, to determine whether Mr. Tijerina was entitled to a departure motion at sentencing.

Once the government determined that Mr. Tijerina had provided substantial assistance, it was obligated to follow through with its agreement to file a departure motion. *Santobello*, 404 U.S. at 262; *see also United States v. Coleman*, 895 F.2d 501, 506 (8th Cir. 1990) ("An express promise to file a motion unambiguously binds the government."); *United States v. Melton*, 930 F.2d 1096, 1098 (5th Cir. 1991) ("[T]he government may neither misrepresent its intentions nor renege on representations reasonably relied and acted upon by defendants . . .."); *see also Mabry v. Johnson*, 467 U.S. 504, 509, (1984) (indicating that "when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a

false premise, and hence his conviction cannot stand"). It did not do so, and the Fifth Circuit's refusal to force the Government to stand by its bargain was an error that should be corrected. Furthermore, the Fifth Circuit's refusal to even address the language of Mr. Tijerina's plea agreement undercuts *Santobello*'s promise to all defendants that their contracts with the Government will be honored.

II. THE ISSUES PRESENTED ARE IMPORTANT AND RECURRING.

This case raises vitally important issues of federal law. Defendants enter guilty pleas in nearly ninety percent of cases in which the United States Federal Sentencing Guidelines apply, and most pleas involve some form of agreement with the prosecutor. *See* Justin H. Dion, *Criminal Law – Prosecutorial Discretion or Contract Theory Restrictions? The Implications of Allowing Judicial Review or Prosecutorial Discretion Founded on Underlying Contract Principles*, 22 W. New. Eng. L. Rev. 149, 151 (2000). In many plea agreements, to ensure full compliance and cooperation from the defendant, the government reserves the "sole discretion" to determine whether or not the defendant has in fact provided substantial assistance. Because the defendant has a significant interest in having the prosecutor file a substantial assistance motion, the defendant is encouraged to assist the prosecutor to his or her fullest ability. Yet absent a motion for sentence reduction, a defendant has no chance at getting a sentence less than the statutory minimum. Frequently, however, a defendant like Mr. Tijerina will do everything within his or her power to substantially assist the prosecutor, and the prosecutor will still choose not to file a sentence reduction motion. Thus, the defendant has no chance of obtaining a sentence below the statutory minimum, and is forced to endure the full extent of punishment, regardless of the extent of his or her prosecutorial assistance. *See, e.g., United States v. Isaac*,

141 F.3d 477, 480 (3rd Cir. 1998) (stating that while the defendant had met with prosecutors and attempted to reveal all information in his possession, the government still chose not to file a § 5K1.1 motion).

Processes like these, if allowed to continue unchecked, must sooner or later undercut the usefulness of plea agreements as tools when those agreements promise to move for downward departure if in the Government's "sole discretion" the defendant provides "substantial assistance." They also hold the Government and its agents to a lower standard of behavior than this Court has required of them before. In *Berger v. United States*, 295 U.S. 78, 88 (1935), this Court stated:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In sum, for the Government to ostensibly promise something to defendants like Mr. Tijerina in order to induce their guilty pleas while at the same time retaining the complete discretion not to live up to its promises is to strike a "foul one" indeed. *See also United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997) ("[V]iolations of plea agreements

on the part of the government serve not only to violate the constitutional rights of the defendant, but directly involve the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government."). The Government, like all parties, should live up to its contracts, and Mr. Tijerina should have the chance to have any substantial assistance he provides or has provided be rewarded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER T. STIDVENT
Counsel of Record
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
(202)639-7763

Attorney for Petitioner

July 11, 2002

APPENDIX

APPENDIX CONTENTS

APPENDIX A

Opinion, *United States of America v. Ernesto Tijerina*.....1a-2a

APPENDIX B

Memorandum of Plea Agreement.....3a-6a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-41365

Summary Calendar

United States of America, Plaintiff – Appellee, v. Ernesto Tijerina, Defendant – Appellant.

Filed: April 15, 2002

Before KING, Chief Judge, and DAVIS and JONES, Circuit Judges.

PER CURIAM:*

Ernesto Tijerina pleaded guilty to count 1 of an indictment charging him with possession with intent to distribute more than 1,000 kilograms of marijuana and has appealed his conviction and sentence. Tijerina contends that the district court erred in calculating the quantity of marijuana involved in the offense. We review this issue for plain error. The issues raised by Tijerina respecting the district court's drug-quantity calculation involve questions of fact capable of resolution by the district court upon proper objection. Such questions can never constitute plain error. *See United States v. Sparks*, 2 F.3d 574, 589 (5th Cir. 1993); *United States v. Pofahl*, 990 F.2d 1456, 1479 (5th Cir. 1993).

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.3.

Tijerina contends that the district court erred in failing to determine whether his attorney labored under an actual conflict of interest and in refusing to appoint substitute counsel. Although Tijerina objected initially that his retained counsel labored under a conflict of interest, Tijerina waived this issue when he reentered his guilty plea. *See United States v. Wise*, 179 F.3d 184, 186 (5th Cir. 1999). Because Tijerina failed to show good cause, the district court did not abuse its discretion in refusing to appoint substitute counsel. *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973).

Tijerina complains that he did not receive a downward departure under U.S.S.G. § 5K1.1. The district court is without the authority to grant a downward departure without a Government motion. *See United States v. Price*, 95 F.3d 364, 367 (5th Cir. 1996).

Tijerina contends that he received ineffective assistance of counsel because his attorney failed to challenge the quantity of drugs at sentencing. Tijerina's speculation that the drug quantity may have been less than 1,000 kilograms does not demonstrate that counsel was deficient in failing to challenge the drug quantity at sentencing. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The judgment is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

UNITED STATES

V.

ERNESTO TIJERINA

CRIMINAL NO. C-00-260

MEMORANDUM OF PLEA AGREEMENT

1. The Defendant knowingly and voluntarily agrees with the United States, through the United States Attorney for the Southern District of Texas, through the undersigned Assistant U.S. Attorney to plead guilty to Count One (1) of the above numbered Information.

2. Pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure and in consideration for the Defendant's plea of guilty and truthful testimony to the Court at the time of the Defendant's re-arraignment and sentencing and for the Defendant's truthful rendition of facts to the U.S. Probation Department for the preparation of the Defendant's Presentence Investigation Report, the Government will:

a. Recommend the Defendant be given a three (3) level credit for acceptance of responsibility.

b. Recommend a sentence at the low end of the applicable guideline range.

3. The Defendant understands that should the guideline imprisonment range be below the mandatory minimum punishment of ten (10) years imprisonment, then the lowest sentence he can receive will be ten (10) years imprisonment since the mandatory minimum period of imprisonment will control over the guideline range if the Defendant is not otherwise eligible for sentencing under 18 U.S.C. 3553(f) known as the "safety valve," or 5K1.1 as described below.

4. Furthermore, should the Defendant provide substantial assistance to the Government as outlined in U.S. Sentencing Guidelines, Section 5K1.1 and 18 U.S.C. 3553(e) the Government will recommend to the Court a reduction in the Defendant's sentence and recommend a sentence commensurate with the value, completeness, and truthfulness of the Defendant's information. This agreement does not obligate the Government Attorney to make a motion for downward departure if in the Government Attorney's evaluation the Defendant has not provided substantial assistance. Substantial assistance is understood by both parties to require good faith during all phases of the cooperation period, to include complete and honest debriefing which assists in the investigation or prosecution of other individuals, and complete and truthful testimony at subsequent trials when needed. In this connection, it is understood the Government's determination of whether the Defendant has cooperated fully and provided substantial cooperation, and the Government's assessment of the value, truthfulness and completeness of the Defendant's cooperation are solely within the judgment and discretion of the Government and shall be binding upon the Defendant. The Defendant agrees the decision whether to file such a motion rests within the sole discretion of the Government.

5. Pursuant to § 1B1.8 of the Sentencing Guidelines, the Government agrees to recommend to the Court that any information tendered by the Defendant during debriefing sessions with the law enforcement officers, to the extent that such information was unknown to the Government prior to the debriefings, not be utilized in the calculation of his sentencing guideline range.

6. Neither the Government nor any law enforcement officer can or does make any promises or representations as to what sentence will be imposed by the Court.

7. Should it be judged by the Government the Defendant has committed or attempted to commit any additional crimes from the date of the Defendant's signing of this plea agreement to the date of the Defendant's sentencing, the Government will be released from its obligations to recommend credit for acceptance of responsibility and/or to move for a reduction in sentence for substantial assistance and is free to argue for any sentence within statutory limits. Such a breach by the .Defendant will not release the Defendant from this plea of guilty. The Defendant further understands and agrees the special assessment is due and payable to the U.S. District Clerk's Office immediately following the Defendant's sentencing.

/s/ Ernesto Tijerina 8/20/00

/s/ Attorney for Defendant 8/20/00

MERVIN M. MOSBACKER
UNITED STATES ATTORNEY
/s/ Mark Patterson – Assistant United States Attorney
8/28/00